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UNFAIR COMPETITION BY MONOPOLISTIC CORPORATIONS

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I believe that it is high time that we should give up the hopeless attempt to destroy by law without making any distinctions all aggregations of capital, and that we should adopt in its place the promising program of the regulation of the whole situation by appropriate law. The ideal condition, to my way of thinking, is to have monopoly, where that is the more effective form, and competition where that is the natural thing. To that end, the law should do its best to see to it that there shall be an open market in which that type which is the economically advantageous one shall survive. When it is more or less true that any man may enter any business upon his merits, the maintenance of this open market is assured. But if men in every business are left at the mercy of the predatory tactics of the combinations, the door of opportunity is closed. And to the majority of men an end of competitive conditions in the ordinary businesses would seem the final catastrophe beyond which there could be nothing but the horror of anarchy or the hopelessness of socialism. It is because of these perils to society that we are finding to-day such agreement as to the propriety of regulation of the industrial situation by law. A very great change this is, from the doctrines of *laissez faire* of the early nineteenth century to the principle of state control in this early twentieth century.

It is fundamental in our law that mere competition is not a sufficient justification for taking away business from a rival; it must be fair competition as well. Generally speaking, a customer may be taken away from a rival by any fair inducement, but not by any unfair methods. Advertisement and solicitation, for example, are fair; fraud and intimidation, equally plainly, are unfair. Speaking generally, as one must here, that is held fair which the community regards as consistent with its safety; that is held unfair which the state considers dangerous to its peace. The predatory tactics of the modern trusts have shown us that there are new wrongs which our

law must be prepared to meet. It is not enough to maintain an effective police against the old wrongs. There are new sins against industrial society which the law must be capable of reaching. A narrow conception of the older cases would not give the law scope enough to meet these new conditions. But our common law, as a system of justice proves itself, from age to age, capable of dealing with the wrongs of which that age complains. Make the law as big as the business, and the problem is solved.

It is one of the paradoxes of the time that, while every praise is accorded to those leaders in any business who bring about noteworthy progress in industrial efficiency, there is apparently nothing but universal execration for those who have founded the great concerns in any industry. And yet it seems clear that in certain business you can not have the highest degree of industrial efficiency without the greatest possible concentration. Where monopoly is thus natural, I am prepared to argue that there is necessarily something good in it, which can be turned to the common advantage, if its conduct should be effectively regulated. Indeed, I am not afraid to say that I believe that efficient regulation is the real solution of the trust problem, because I see in many of the trusts much that can be turned to good, as well as much that is a menace to the public welfare. At least, I think it is time that we should face the fact that monopoly is inevitable in those businesses where the situation is such that competition will not longer work effectively. The present campaign for the dissolution of all aggregations of capital I consider as unintelligent as the terrorist propaganda.

I do not believe that the law should any longer attempt to destroy all of the trusts. Neither do I think that we should make an entire change in the law, and be content simply to regulate all of the trusts. I believe that there are good trusts and bad ones, although it may be difficult to draw the line between them. That is, I would have the anti-trust laws remain on the books substantially as they are, so that the recent victories against illegal combinations might be followed up; but I would have new legislation by which legitimate concerns might no longer be worried. It may be hard to distinguish illegal aggrandizement from legitimate growth, but this will be no more difficult a line to draw than that which divides illegality from legality in many another matter. Indeed, I think that the distinction between natural monopoly and unnatural monopolization

should now be sufficiently clear, if not to business men themselves, at least to their counsel.

There are policies which have been used in the past to get control of the market the illegality of which is beyond argument. The story of these ruthless forays by which the robber trusts used to harry the country accounts for much of the indiscriminate denunciation of the trusts which we still hear. (1) Foremost are the rebates from the railroads, to which many a trust owes its dominance. (2) Hardly less important has been the abuse of the patent laws by the getting out of lists of patents as the basis for lawsuits against competitors. (3) Another similar policy was the establishment of a bogus competing concern. (4) Bribery of employees to get at trade secrets appears all too frequently. No one can defend such policies; we need not discuss them further. Where these circumstances appear, no mercy can be shown. But these are unnatural monopolies, or, at all events, this is illegal monopolization. Some of these trusts could never have gained their control of their markets without such predatory competition. If they still have control of their market, it can only be because they are maintaining their monopoly by unfair tactics.

But there are other policies by which many trusts have gained their dominating position, the illegality of which has not been so clear. (1) Such an excluding policy as the refusal to sell to retailers, who persist in buying anything of a rival manufacturer, is one example. (2) Making a lower price in certain localities, where incipient competition has appeared, is another. (3) Imposing terms in leases that the lessee shall not buy anything of the same sort has been used with fatal effect. (4) Fixing the prices at which the product may be resold is in the same class. The monopolies which are keeping their position by these policies have no economic justification, and for them there can be no defense. I believe that the law should punish such discriminatory practices as these so severely that no one would take the risk of employing them. We have been successful in making railroad rebating almost as dangerous to practice as embezzlement. What I am urging is regulation to any degree that may be necessary. For I believe that such police of the commercial situation is necessary for the securing of industrial freedom.

Little need be said by me in support of the general policy for free competition. Equal opportunity for individual advancement

must be insisted upon if society as at present constituted is to exist. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict. It is plain that the proposition that what one man lawfully can do, any number of men acting together by combined agreement, lawfully may do is too dangerous to pass unchallenged. It is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased power of organized combination. The difference between the power of an individual acting according to his preference, and that of combination is fundamental. The law of the land ought long ago to have made punishable these crimes against industrial society. If trade competition be the industrial war we are told it is, at least let us have those laws of war that modern humanity demands. It is the disgrace of the law that it did not see sooner that business policies which were not especially harmful in the older days of free competition had become too deadly to be allowed when employed by a monopoly.

The great combination with substantial control of its market differs fundamentally from the small one which is simply a factor in competition. Our law from time immemorial has subjected those who had monopoly, whoever they might be, to an extraordinary system of regulation, as compared with the virtual freedom accorded to those who had no control of their market. This regulation by law has always been the policy of the state in dealing with any business which has so far attained control of its market as to be affected with a public interest. What the law regarding monopoly has always considered as altogether illegal is any form of discrimination. Discrimination in the conduct of a business which is affected with a public interest is essentially dangerous. We have put an end for practical purposes to railroad rebating by the Interstate Commerce law with an Interstate Commerce Commission to enforce it, and I believe that we could be equally successful in putting an end to trust discrimination by an Interstate Trade Act with an Interstate Trade Commission to enforce it.

What I would urge would be not a repeal of the Sherman act; I would leave that for its appropriate work of dissolving combinations in restraint of trade. But I would supplement it by an act to regulate concerns that have established a control of their market. My own idea in drafting such an Interstate Trade Act would be to follow

the Interstate Commerce Act, as far as that could be done. In doing this, we should have the advantage of using a well-tested code. As the President in his trust message declares himself ready to accept an Interstate Trade Commission, it is not improbable that the present Congress will provide for one upon somewhat the same basis as that of the Interstate Commerce Commission. Only legitimate concerns, however, should be permitted to register themselves under this commission; the illegitimate monopolies should be turned over to the tender mercies of the anti-trust law, although the commission might well be invested with the power to superintend the dissolution of these monopolies.

First.—Establish an Interstate Trade Commission of seven members, with salary and tenure like the Interstate Commerce Commission. The present Bureau of Corporations should be made a bureau of the commission, to serve it as an investigating agency. A year ago the proposal of an Interstate Trade Commission would have aroused a storm of protest. We would have been told that it meant socialism and nothing less for the government to attempt to regulate these businesses thus. But governmental regulation—even to the extent of fixing prices—has been urged so often during the past few months by such influential persons that I assume there are very many of you who are quite ready to have such a commission tried, and your interest will be in the details of the proposal.

Second.—Require every manufacturing and trading concern of a certain size to register itself with the commission in order to get a federal license to engage in interstate commerce. There is, it seems to me, no need of requiring federal incorporation of the trusts under the control of a trade commission any more than there has proved to be need of federal incorporation of the railroads subject to the commerce commission. Demand of every concern registering, a full statement of its condition, including particularly its capitalization and the basis of that capitalization. Require each registered concern to make an annual report, including its balance sheet, income, account, volume of output, value of output, etc.

Third.—Give the Interstate Trade Commission power to regulate all concerns that have substantial control over their market. This can be determined in the first instance by the commission upon the basis of the returns that have been filed by the various concerns upon taking out their federal licenses. Concerns that have a substantial

control over their market are so affected with a public interest that they may properly be controlled to the extent that the public services are. Moreover, the commission should have full powers to make investigations and report thereon. If they find that any concern is party to an illegal act, they should bring the matter to the attorney-general for appropriate action.

Fourth.—Define what are unfair practises; for destructive competition in a monopolistic business has various forms, such as (1) selling in one locality at discriminating prices in order to force out local competition; (2) selling one grade or variety at disproportionate prices in order to force out competition; (3) refusing to sell to purchasers who will not agree to deal with a rival; (4) imposing terms in leases that the lessee shall not buy anything from any one else; (5) fixing the terms and prices upon which the product shall be resold; (6) establishing a monopoly by requiring the purchase of other things from the patentee than the patented article. In other words, prohibit making discriminations against customers who refuse to obey the dictates of the trusts. Make this plain by requiring sale to all purchasers upon equal terms under substantially similar circumstances.

Fifth.—Give the Interstate Trade Commission power to give relief against extortionate charges. At first, confine its power over prices to reducing prices against which specific complaint has been made to it, but in disposing of such complaints let it fix the price in question for the future. Provide that full returns shall be made as to the outstanding securities and actual capital of the concerns subject to the act as the basis for such regulation. But at first provide that dividends shall not be reduced when the concern in question is not making more than a fair per cent of profit upon each transaction. I would go very slowly in this matter at first, giving the commission only power to give relief in particular cases of outright extortion. Here, as elsewhere, I believe in preserving individual initiative. I am for state control, not for government management.

Sixth.—Persons aggrieved by unfair competition or by extortionate prices may bring complaint before the Interstate Trade Commission, which shall give appropriate relief. Aggrieved persons may also bring suit in courts for unfair competition or extortionate prices. The commerce court should have the same powers in relation to appeals as from the Interstate Commerce Commission. The com-

mission of its own initiative should have power to investigate unfair business by any registered company and report its results. The commission might perhaps be empowered to pass upon new issues of securities by the corporation subject to its control.

This program ought to accommodate the conflicting interests involved in this issue. It should be the abuse, not the possession of monopoly, that should subject a concern to prosecution under the law in the future. The essence of the wrong of monopolization is the excluding of others from the market, not the mere growth of the concern itself, by successful activity. In other words, it is unnatural growth by unreasonable tactics that should be punished, not natural growth by deserved success. Monopolization by exclusive policies and unjustifiable discrimination is the thing to be prevented. Make the law as big as the business and the problem is solved.

With an open market, a rival concern may succeed on its merits; but not if the trusts are allowed to control the market. If this opportunity is preserved, there will be protection against any injury to the public—if not by competition itself, by the potentiality of competition. If the unfair competition of the trusts is forbidden, competition by outside concerns will always be possible. There is in every industry an impelling tendency to do business upon that scale, large or small, which is economically the most advantageous. If the law sternly repressed unfair tactics the natural processes of fair competition would inevitably result in there being natural monopolies only in those comparatively few businesses where there is no limit to the law of decreasing costs. Only those trusts that deserved to survive would survive; unless they could produce cheaper than their rivals, they would be doomed. By this legal solution we might solve the trust problem by the natural method.